

ESTTA Tracking number: **ESTTA26387**

Filing date: **02/18/2005**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

<b>Proceeding</b>	91153755
<b>Party</b>	Defendant PRIDE OF PLACE PLANTS, INC.  674 CROMARTY AVENUE CAX SIDNEY, BRITISH COLUMBIA V8L 5G6,
<b>Correspondence Address</b>	VINCENT G. GIOIA CHRISTIE, PARKER & HALE, LLP, PO BOX 7068 PASADENA, CA 91109
<b>Submission</b>	Opposition to Request to Reset Rebuttal Testimony and Briefing Periods
<b>Filer's Name</b>	Brian K. Brookey
<b>Filer's e-mail</b>	pto@chp.com, bkb@cph.com
<b>Signature</b>	/Brian K. Brookey/bkb
<b>Date</b>	02/18/2005
<b>Attachments</b>	opprebut.PDF ( 9 pages )

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
TRADEMARK TRIAL AND APPEAL BOARD

WALTERS GARDENS, INC.

Opposer,

v.

PRIDE OF PLACE PLANTS, INC.

Applicant.

Opposition No. 91153755

**OPPOSITION TO REQUEST TO  
RESET REBUTTAL TESTIMONY  
AND BRIEFING PERIODS**

Applicant, Pride of Place Plants, Inc. ("PoPP") opposes in part the request of Walters Gardens, Inc. ("WGI") to reset the rebuttal testimony and briefing periods in this matter.

WGI's request is based on several untruths and on numerous critical omissions. It is true that the testimonial deposition of Rick Sorenson was taken on December 22, 2004, and that PoPP was not able to serve a copy of the transcript within 30 days (or January 21, 2005). This is due to communication issues between PoPP's counsel and the court reporting service. As soon as PoPP received the transcript, it served a copy of it on WGI and filed it with the Board. [Declaration of Brian K. Brookey ("Brookey Dec."), ¶ 2.]

However, WGI's contention that it "did not receive a copy of the transcript until February 14, 2005" is false. In fact, PoPP has learned that WGI obtained a copy of the transcript directly from the court reporter service on or about January 12, 2005, *nearly a month earlier than WGI represents*. And PoPP's counsel e-mailed an electronic version of the transcript to WGI's counsel on February 7, 2005. Although it is true that WGI did not receive its formal

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service copy of the transcript until the following week, the fact remains that the service copy was the third copy of the transcript that WGI received. [Brookey Dec., ¶ 3 and Exhibit 1.]

The Board need not take PoPP's word for it on this issue: on February 1, 2005, WGI filed a notice of reliance on certain (out of context) portions of Mr. Sorenson's deposition testimony, *citing to specific pages of the Sorenson deposition transcript*. WGI fails to explain to the Board how, on February 1, 2005, it managed to cite to specific pages of a deposition transcript that it supposedly "did not receive" until two weeks later. By claiming that it did not "receive" the transcript until February 14, 2005, WGI is elevating form over substance at best, and intentionally trying to mislead the Board at worst.

WGI also fails to point out that the original date by which rebuttal testimony was to close was January 18, 2005, three days *before* the transcript was due to be served. Thus, PoPP was under no obligation to serve the transcript on WGI at any time before the rebuttal testimony period was to close, and whether WGI received its service copy on January 21 or on February 14 had no impact on whether WGI could take any rebuttal testimony. Moreover, at no time did WGI ever indicate that it planned to take any rebuttal testimony; to the contrary, WGI's counsel affirmatively represented to PoPP's counsel that it did not. Even after receiving a copy of the transcript on or about January 12, WGI did not attempt to notice any testimonial depositions. [Brookey Dec., ¶ 4.] Simply put, the fact that WGI did not receive its second and third copies of the transcript until more than 30 days after the deposition did not prejudice WGI in the least, and there is no basis for resetting the testimony period.

When this issue first arose, WGI's counsel contacted PoPP's counsel and asked for PoPP to stipulate to extending the briefing schedule. PoPP's counsel reminded WGI that there was no

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reason to reset the rebuttal testimony period, and asked WGI to confirm that all he was requesting was a change in the briefing schedule, WGI's counsel replied that he was "only referring to the briefing dates if that works for you." WGI and PoPP then agreed that they would enter into a stipulation that did not reset the rebuttal testimony period, and that instead simply extended the briefing schedule by two weeks. [Brookey Dec., ¶ 5 and Exhibit 2.] Before the stipulation could be finalized, WGI filed its request, completely renegeing on the agreement it had reached with PoPP. Again, WGI chose not to inform the Board of these important facts.

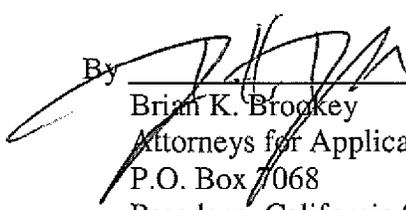
PoPP stands by the original deal it struck with WGI. Even though there is no need to extend the briefing schedule, as an accommodation to WGI, PoPP agrees that the deadline for WGI to file its opening brief may be extended from March 18, 2005 to April 1, 2005, that the deadline for PoPP to file its opposing brief may be extended from April 18, 2005 to May 2, 2005, and that the deadline for WGI to file its reply brief may be extended from May 3, 2005 to May 17, 2005. WGI itself agreed to this brief extension in the briefing schedule, and agreed that there is no need to reset the rebuttal testimony period. WGI should be held to its word, especially since the slight delay in serving WGI with its second and third copies of the deposition transcript did not, and could not have, prejudiced WGI in the least.

Respectfully submitted,

CHRISTIE, PARKER & HALE, LLP

Date: February 18, 2005

By

  
\_\_\_\_\_  
Brian K. Brookey  
Attorneys for Applicant  
P.O. Box 7068  
Pasadena, California 91109-7068  
626/795-9900

**DECLARATION OF BRIAN K. BROOKEY**

I, BRIAN K. BROOKEY declare as follows:

1. I am an attorney with Christie, Parker & Hale, LLP, attorneys of record for Applicant Pride of Place Plants ("PoPP"). I make this declaration of my personal knowledge, and if called as a witness would testify competently to each of the following facts.

2. The testimonial deposition of Rick Sorenson was taken on December 22, 2004. Due to communication problems between my office and the court reporting service, we did not obtain the deposition transcript in time to serve it within 30 days of the deposition (*i.e.*, January 21, 2005). As soon as I finally received the transcript in mid-February 2005, I filed it with the Board and served it on Barry Kane, counsel for Opposer Walters Gardens, Inc. ("WGI").

3. I understand from the court reporting service that Mr. Kane obtained a copy of the deposition transcript from the court reporter on or about January 12, 2005. In addition, after I received an electronic copy of the transcript, on February 7, 2005 I e-mailed a copy to Mr. Kane. A copy of my transmittal e-mail to Mr. Kane is attached as Exhibit 1.

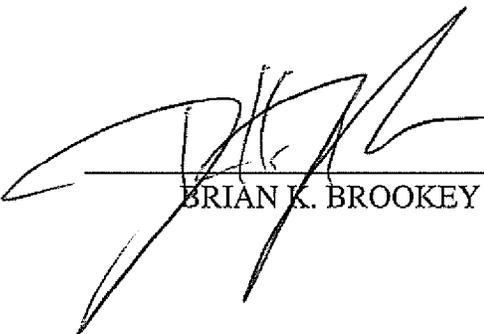
4. The rebuttal testimony period closed January 18, 2005, three days before the deposition transcript needed to be served. During the rebuttal testimony period, Mr. Kane never indicated that he planned to take any rebuttal testimony, nor did he ever serve a notice of deposition. To the contrary, he told me at the conclusion of Mr. Sorenson's deposition that he did not believe any rebuttal testimony was necessary.

5. When this issue first arose, Mr. Kane contacted us and asked us to stipulate to extending the briefing schedule. I reminded him that there was no reason to reset the rebuttal testimony period, and asked him to confirm that he was only requesting a change in the briefing

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schedule and not the testimony period. Mr. Kane sent me an e-mail confirming that he was "only referring to the briefing dates if that works for you." Mr. Kane and I agreed that I would prepare a stipulation for a two-week extension of the briefing schedule, but before it could be finalized, and in contravention of his earlier representations, Mr. Kane filed his request to reset the rebuttal testimony period. A copy of the e-mail exchange between Mr. Kane and me in which he confirms that no change in the rebuttal testimony period is needed is attached as Exhibit 2.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct, and that this declaration is executed on February 18, 2005 in Pasadena, California.



BRIAN K. BROOKEY

## Brian Brookey

---

**From:** Brian Brookey  
**Sent:** Monday, February 07, 2005 6:25 PM  
**To:** 'KaneB@mjsc.com'  
**Subject:** Walters v. POPP

Barry -- we have had a lot of trouble getting the Sorenson depo transcript from the court reporter. For now, we have an electronic transcript, which I am attaching. I am hopeful that we will finally have a hard copy tomorrow, at which time we will serve you with a copy and file it with the Board. Sorry for the delay.



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KB)

Brian K. Brookey  
Christie, Parker & Hale LLP  
(626) 683-4524  
brian.brookey@cph.com

**Brian Brookey**

---

**From:** Kane, Barry C. [KaneB@mjsc.com]  
**Sent:** Tuesday, February 08, 2005 8:20 AM  
**To:** Brian Brookey  
**Subject:** RE: Walters v. POPP

Two weeks is fine with me. You can submit the stipulation to that effect if you don't mind.  
Thanks  
BK

-----Original Message-----

**From:** Brian Brookey [mailto:Brian.Brookey@cph.com]  
**Sent:** Tuesday, February 08, 2005 11:15 AM  
**To:** Kane, Barry C.  
**Subject:** RE: Walters v. POPP

Okay. I'm sure we can work something out. Do you want to extend the dates, say, two or three weeks, since there was roughly a two-week delay?

-----Original Message-----

**From:** Kane, Barry C. [mailto:KaneB@mjsc.com]  
**Sent:** Tuesday, February 08, 2005 8:13 AM  
**To:** Brian Brookey  
**Subject:** RE: Walters v. POPP

I am only referring to the briefing dates if that works for you.

-----Original Message-----

**From:** Brian Brookey [mailto:Brian.Brookey@cph.com]  
**Sent:** Tuesday, February 08, 2005 11:11 AM  
**To:** Kane, Barry C.  
**Subject:** RE: Walters v. POPP

By remaining dates, I assume you mean the briefing schedule? As you know, the rebuttal period closed before the transcript was due, so I don't see any reason to re-open it.

-----Original Message-----

**From:** Kane, Barry C. [mailto:KaneB@mjsc.com]  
**Sent:** Tuesday, February 08, 2005 5:48 AM  
**To:** Brian Brookey  
**Subject:** RE: Walters v. POPP

Brian:

When you get around to filing the copy with the board, I ask that you include with the submission a request to reset all of the remaining dates in the case. The testimony was due January 22 and our rebuttal testimony period has since closed and the briefing period is upon us.

Barry

-----Original Message-----

**From:** Brian Brookey [mailto:Brian.Brookey@cph.com]  
**Sent:** Monday, February 07, 2005 9:25 PM  
**To:** Kane, Barry C.

**Subject:** Walters v. POPP

Barry -- we have had a lot of trouble getting the Sorenson depo transcript from the court reporter. For now, we have an electronic transcript, which I am attaching. I am hopeful that we will finally have a hard copy tomorrow, at which time we will serve you with a copy and file it with the Board. Sorry for the delay.

<<221204rs.ptx>>

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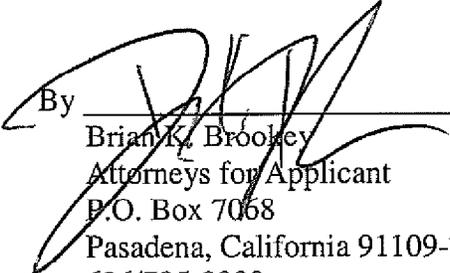
**CERTIFICATION OF MAILING AND SERVICE**

I certify that on February 18, 2005, the foregoing **OPPOSITION TO REQUEST TO RESET REBUTTAL PERIOD** was electronically filed with the United States Patent and Trademark Office of the United States.

It is further certified that on February 18, 2005, the foregoing **OPPOSITION TO REQUEST TO RESET REBUTTAL TESTIMONY AND BRIEFING PERIODS** is being served by mailing a copy thereof by first class mail addressed to:

Barry C. Kane, Esq.  
Miller, Johnson, Snell & Cumminskey  
250 Monroe Avenue NW Suite 800  
Grand Rapids, MI 49501-0306

By \_\_\_\_\_



Brian K. Brooker  
Attorneys for Applicant  
P.O. Box 7068  
Pasadena, California 91109-7068  
626/795-9900

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